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EX P GUAN TEIK SDN BHD (SUBSTITUTING LIM OO GUAN, DECEASED)

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
B ARIFIN ZAKARIA CJ (MALAYA)
AUGUSTINE PAUL FCJ
[CIVIL APPEAL NO: 02(i)-27-2008(K)]
29 MAY 2009

C ***CIVIL PROCEDURE:*** *Parties - Substitution of parties - Seeking to appoint deceased respondent's son to represent estate - Whether consent must be obtained from person not already a party to the proceedings - Rules of the Court of Appeal 1994, rr. 41, 43*

D This case originated in the High Court in 1981. The action arose as a result of a dispute relating to the sale and purchase of a piece of land that was alleged to have taken place in 1974. The trial was not concluded until 1996. Judgment was given in favour of the plaintiffs. The defendant appealed to the Court of Appeal which was allowed. The plaintiffs' motion for leave to appeal was dismissed by E the Federal Court in 2000 and therefore it was for the Court of Appeal to decide on costs. Before the question of costs was decided, the first plaintiff (now respondent in the appeal to the Court of Appeal) died. The defendant (now appellant) sought to appoint one of the sons of the first plaintiff/respondent to be a representative to F the estate of the deceased first plaintiff. The Court of Appeal dismissed the defendant/appellant's motion to replace the first plaintiff on the grounds that consent was required before a person could be appointed as a legal representative. Subsequently, the defendant/appellant was granted leave to appeal on the following G question of law as to whether in an application under r. 41 of the Rules of the Court of Appeal 1994 ('the Rules') consent must be obtained from a person not already a party to the proceedings to appoint him as representative to the estate of the deceased first plaintiff.

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Held (allowing the appeal) (majority decision)
Per Arifin Zakaria CJ (Malaya):

(1) Rule 41 has in its contemplation a dispensation of the consent I of the person to be added as a party. This is fortified by r. 43 which allows the person to be added as a party to apply to the court to discharge or vary the order within 12 days from the

date of service of the order on him. If indeed the consent of the person proposed to be added as a party was required before he or she could be made a party, then it would go against r. 41 which allows such an application to be made *ex parte*. In any event, the person would not in any way be prejudiced by such an application as under r. 43 he or she is free to apply to the court to have the order given under r. 41 be set aside or varied. (paras 6 & 7)

Per Augustine Paul FCJ:

(1) Rule 41, in plain and unambiguous terms, stipulates that an order to add a person as a party may be obtained *ex parte*. An *ex parte* application was therefore one that was made without notice to, or argument by, the person to be affected. Obviously this would exclude the consent of the person concerned. Rule 41 clearly had in contemplation the dispensation of the consent of the person to be added as a party. The person added as a party may apply to the court to discharge or vary the order at any time within twelve days from the service thereof on him pursuant to r. 43. This would only arise if the order making him a party was, in the first place, obtained without his consent. An application under r. 41 does not require the consent of the person who is to be made a party. The procedure adopted by the defendant was thus correct in law. (para 17)

Per Zaki Tun Azmi CJ (dissenting):

(1) The fact that the application can be made *ex parte* was insufficient to enable the applicant to just nominate any person. It is the estate which will be prejudiced, not the representative, if the representative chooses not to respond to any order obtained *ex parte*. Therefore, the intended representative must give his consent. (paras 37, 38 & 39)

Bahasa Malaysia *Translation Of Headnotes*

Kes ini bermula di Mahkamah Tinggi pada tahun 1981. Kes ini timbul akibat pertikaian mengenai jual beli sebidang tanah yang berlaku pada tahun 1974. Perbicaraan hanya berakhir pada tahun 1996. Penghakiman diberikan bagi pihak plaintif-plaintif. Defendan merayu ke Mahkamah Rayuan dan rayuannya dibenarkan. Usul plaintif-plaintif untuk memohon kebenaran untuk merayu

diketepikan oleh Mahkamah Persekutuan pada tahun 2000 dan dengan itu ia adalah bagi Mahkamah Rayuan untuk memutuskan mengenai kos. Sebelum persoalan kos dapat diputuskan, plaintif pertama (responden dalam rayuan ke Mahkamah Rayuan) meninggal dunia. Defendan (perayu) memohon untuk melantik anak lelaki plaintif pertama/responden untuk menjadi wakil estet plaintif pertama. Mahkamah Rayuan menolak usul defendan/perayu untuk menggantikan plaintif pertama atas alasan bahawa persetujuan diperlukan sebelum seseorang boleh dilantik sebagai wakil di sisi undang-undang. Seterusnya, defendan/perayu diberi kebenaran untuk merayu atas persoalan undang-undang sama ada dalam permohonan di bawah k. 41 Kaedah-kaedah Mahkamah Rayuan 1994 ('Kaedah-kaedah'), keizinan mesti diperolehi oleh seseorang yang bukannya pihak kepada prosiding untuk melantiknya sebagai wakil estet plaintif pertama.

Diputuskan (membenarkan rayuan) (keputusan majoriti)
Oleh Arifin Zakaria HB (Malaya):

(1) Kaedah 41 mempertimbangkan kemungkinan pengenepian keizinan oleh seseorang yang akan ditambah sebagai satu pihak. Ini disokong oleh k. 43 yang membenarkan seseorang ditambah sebagai satu pihak memohon ke mahkamah untuk menolak atau mengubah perintah dalam masa 12 hari dari tarikh penyampaian perintah kepadanya. Jikalau keizinan seseorang yang dicadangkan ditambah sebagai satu pihak diperlukan sebelum beliau dijadikan satu pihak, ia akan bertentangan dengan k. 41 yang membenarkan permohonan sebegini dibuat *ex parte*. Walau apapun, seseorang itu tidak akan diprejudiskan oleh permohonan tersebut kerana di bawah k. 43 seseorang itu mempunyai kebebasan untuk memohon ke mahkamah supaya perintah yang diberi di bawah k. 41 diketepikan atau diubah.

Oleh Augustine Paul HMR:

(1) Kaedah 41, dalam terma nyata dan jelas, menyatakan bahawa perintah untuk menambah seseorang sebagai satu pihak boleh diperolehi secara *ex parte*. Permohonan *ex parte* adalah suatu permohonan yang boleh dibuat tanpa memberi notis, atau hujahan, oleh pihak yang akan terjejas. Dengan jelasnya, ini mengecualikan persetujuan pihak yang berkenaan. Kaedah 41 dengan nyata mempertimbangkan kemungkinan pengenepian keizinan oleh seseorang yang akan ditambah sebagai satu pihak. Seseorang yang ditambah sebagai pihak boleh memohon ke

mahkamah untuk menolak atau mengubah perintah dalam masa 12 hari dari tarikh penyampaian perintah kepadanya di bawah k. 43. Ini hanya timbul jikalau perintah yang menambahkannya sebagai pihak adalah, pada mulanya, diperolehi tanpa persetujuannya. Permohonan di bawah k. 41 tidak memerlukan keizinan seseorang yang dijadikan satu pihak. Prosedur yang digunakan oleh defendan adalah betul di sisi undang-undang.

Oleh Zaki Tun Azmi KHN (menentang):

(1) Fakta bahawa permohonan boleh dibuat *ex parte* tidak mencukupi untuk membolehkan perayu melantik sesiapa sahaja. Estet akan diprejudiskan, bukan wakil, jikalau wakil memilih untuk menolak perintah yang telah diperolehi *ex parte*. Oleh itu, bakal wakil perlu memberi keizinan.

Case(s) referred to:
Aspden v. Seddon [1877] WN 207 ***(refd)***
Curtis v. Caledonian Fire and Life Insurance Company [1881] [Vol XIX] Ch 534 ***(refd)***
In re Richerson Scales v. Heyhoe (No. 2) [1893] 3 Ch 146 ***(refd)***
Meredyth and Two Others v. Hughes and Others [1839] 3 Y & J 188 ***(refd)***
Pratt v. London Passenger Transport Board; Green v. Vandekar [1937] 1 All ER 473 ***(refd)***
Re Curtis and Betts [1887] WN 126 ***(refd)***
Watts v. Official Solicitor [1936] 1 All ER 249 ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, rr. 41, 43
Rules of the High Court 1980, O. 18 r. 19

Rules of the Supreme Court [UK], O. 16 r. 48

Other source(s) referred to:
Bindra's, *Interpretation of Statutes*, 7th edn, pp 491, 497, 508, 552, 554

For the appellant - Wong Yee Chue; M/s Lim Kean Siew & Co

[Appeal from Court of Appeal; Civil Appeal No: K-02-152-1996]

Reported by Suhainah Wahiduddin

JUDGMENT

Arifin Zakaria CJ (Malaya):

[1] I have had the benefit of reading the judgments of the learned CJ and my learned brother Augustine Paul, FCJ. Each of them had expressed divergent views on the issue at hand.

[2] The facts of the case are set out in their judgments and I do not propose to restate them here. The issue of law that was posed to us reads as follows:

> In an application under rule 41 of the Rules of the Court of Appeal 1994 to appoint a person who is not a personal representative of the estate of the deceased to represent the deceased's estate to carry on with the proceedings, is the consent of that person necessary?

[3] The answer to this question turns on the interpretation to be given to r. 41 of the Rules of the Court of Appeal (the Rules) read in conjunction with r. 43 of the Rules.

[4] Having considered these two related Rules, with respect, I agree with the interpretation adopted by my learned brother Augustine Paul, FCJ. Briefly my reasons are as follows:

[5] Rule 41 in clear term provides that an order to add a person as a party to the suit may be obtained on an *ex parte* application. By definition the term *ex parte* means that the order can be taken or granted on the application by one party in the absence of the other. (See *Concise Law Dictionary*, P.G. Osborne, 1964, 5th edn).

[6] On that premise I agree with Augustine Paul, FCJ that r. 41 has in its contemplation a dispensation of the consent of the person to be added as a party. This is fortified by r. 43 which allows the person to be added as a party to apply to the court to discharge or vary the order within 12 days from the date of service of the order on him.

[7] If indeed the consent of the person proposed to be added as a party is required before he or she could be made a party, then it would go against r. 41 which allows such an application to be made *ex parte*. In any event the person will not in any way be prejudiced by such an application as under r. 43 he or she is free to apply to the court to have the order given under r. 41 to be set aside or varied.

[8] On the above premise I would therefore, answer the question posed to us in the negative and consequently the appeal is allowed. In the circumstances of this case I agree that there shall be no order as to costs both here and in the court below.

Augustine Paul FCJ:

[9] The issue for deliberation in this appeal is whether the consent of a person not already a party to a proceeding must first be obtained before he is made a party to it pursuant to r. 41 of the Rules of the Court of Appeal ("r. 41").

[10] The facts of the case as outlined in the judgment of the Court of Appeal are as follows. The plaintiffs in the High Court were Haji Mohd Noor bin Haji Yakub, Sofiah binti Omar and Haji Harun bin Omar while the defendant (the appellant in the Court of Appeal and in this court) was Guan Teik Sendirian Berhad (menggantikan Lim Oo Guan, simati). By an *ex parte* notice of motion dated 8 May 2008 the defendant applied for an order under r. 41 that this appeal and all the proceedings related thereto be carried on between the defendant and one Md. Zaini bin Haji Mohd Noor, in place of Haji Mohd Noor bin Haji Yakub who had passed away on 3 March 2008, as representative of the estate of Haji Mohd Noor bin Haji Yakub and the other plaintiffs. The defendant's application was supported by an affidavit affirmed by Dato' Khow Choon Thiew @ Khoo Kiap Leng, a director of the defendant. It was averred in the affidavit that the defendant had appealed against the decision of the High Court at Alor Setar given on 12 February 1996. On 12 July 1999 the defendant's appeal was allowed by the Court of Appeal with the order that the costs of the appeal and the costs at the court below be paid by the plaintiffs to the defendant. The defendant began proceedings for taxation in the Court of Appeal and the taxation of the plaintiff's bill of costs was fixed for hearing on 28 September 2007. It was adjourned to 7 December 2007 as counsel for the plaintiff was absent on the date fixed. It was again fixed for taxation on 16 May 2008. The first plaintiff passed away on 3 March 2008. According to the defendant its cause of action against the first plaintiff was transmitted to his estate after his death and Md. Zaini bin Haji Mohd Noor, as a son and one of the beneficiaries to the deceased's estate, was the proper person to be appointed as the representative of the estate for the purpose of the proceedings for taxation.

[11] The notice of motion was dismissed with costs by the Court of Appeal. Hasan bin Lah JCA in writing for the court said:

> We were mindful that under r. 14 (sic) of the Rules the defendant is permitted to make this application *ex parte*. However, the person sought to be appointed to represent the estate of the deceased must give his consent to represent the estate. In this case the defendant did not state whether Md. Zaini bin Haji Mohd Noor had consented to the defendant's application. *Pratt v. London Passenger Transport Board; Green v. Vandekar* [1937] 1 All ER 473 are cases on point. In the first case the plaintiff applied under Ord. 16 r. 46 of the Rules of The Supreme Court for an order that the Official Solicitor should represent the deceased's estate and be added as a defendant. The order asked was made without the consent of the Official Solicitor. In the second case, the facts were similar, except that the deceased was one of the defendants in the action, and that the order was made without the knowledge of the Official Solicitor. The English Court of Appeal held that there was no power under O. 16 r. 46 to appoint a person against his will to represent the estate of a deceased person.

Ord. 16 r. 46 of the Rules of The Supreme Court provides that:

> If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice (then the notice is specified) and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.

In both the case *(sic)* cited above Slesser L.J. made the following observation:

> R.S.C., O. 16, r. 46, does not say whether the court or judge, if the court is of opinion that a person ought to be appointed, may appoint a person in invitum without having obtained from that person his consent to represent the estate, but, in my opinion, it would be contrary to all principles of justice, and indeed contrary to decided authority, such as there is, to hold that that power to appoint such person to represent the estate could be made against the will and without the consent of the person sought to be appointed.

> Authority, if authority be needed for such a proposition, is to be found in the case of *Re Curtis and Betts* (1), where the court, Cotton, Bowen and Fry, L.JJ., said this among other matters, at p. 127:
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> > It was also wrong to appoint to represent an estate a person who was unwilling to act.
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> Accordingly, in the instant case we were of the view that Md. Zaini bin Haji Mohd Noor could not be appointed to represent the estate without his consent as he was not the personal representative of the deceased.
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> Having carefully considered the matter we came to the conclusion that this was not a proper case for an *ex parte* application. This application ought to have been served on Md. Zaini bin Haji Mohd Noor as well as the other beneficiaries of the estate so that the application could be heard *inter partes.* Since there was no consent from Md. Zaini bin Haji Mohd Noor we were of the view that we cannot allow the defendant's application. For the reasons stated above we dismissed the defendant's application with costs.

[12] On 12 August 2008 the appellant was granted leave to appeal to this court on the following question of law:

> In an application under rule 41 of the Rules of the Court of Appeal 1994 to appoint a person who is not a personal representative of the estate of the deceased to represent the deceased's estate to carry on with the proceedings, is the consent of that person necessary?

[13] In his submission before us learned counsel contended that r. 41 requires the application to be made *ex parte* thereby dispensing with the consent of the person to be made a party. This, he said, is supported by r. 43 of the Rules of the Court of Appeal 1994 ("r. 43"). The result is that it is not necessary to obtain the consent of the person to be made a party.

[14] It is perhaps necessary to refer to some rules of statutory interpretation before proceeding any further. In commenting on the interpretation of a statute when the words used are plain and unambiguous. *Bindra's Interpretation of Statutes*, 7th edn says this at p. 491:

> Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak of the intention of the Legislature. If any statutory provision is capable of only one construction then it would not be open to the Court to put a different construction upon the

A said provision merely because the alternative construction would lead to unreasonable or even absurd consequences. The question of consequences and considerations of policy would be relevant only where the provision sought to be construed is capable of two constructions. In such a case the Court is not concerned with the
B results which may ensue from giving to the plain meaning of the words used by the Legislature. If these results are unfortunate, it is for the Legislature to take action to remedy the defects of the law as enacted; it is not for the Courts to usurp the functions of the Legislature and by straining the meaning, and ignoring the clear terms of the law to seek to evade consequences which, in the
C opinion of the Court, may prove ill-fraught. The effect of the words is a question of law.

And at p. 497:

It has sometimes been said that a statute may be construed in
D accordance with public policy. If the precise words used are plain and unambiguous, the Court is bound to construe them in their ordinary sense, and not to limit plain words in an Act of Parliament by considerations of policy, as to which minds may differ and as to which decisions may vary. Clear language cannot be allowed to be
E controlled by considerations of legislative policy.

And at p 508:

In *Avel v. Lee*, [1871] LR 6 CP 365 Willes, J, said: "I utterly repudiate the notion that it is competent to a Judge to modify the
F language of an Act of parliament in order to bring it into accordance with his views as to what is right and reasonable.

[15] In construing a statute where the words used are ambiguous *Bindra's Interpretation of Statutes* 7th edn says this at p. 552:

G No doubt in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail. Although the language of a statute is first the test for its interpretation, there are other equally important tests, when the
H language is not clear and unambiguous, and when more than one interpretation is possible. In such circumstances, the interpretation which appears to be most in accord with reason, convenience and justice is to be preferred.

And at p. 554:

I It may, therefore, be well settled that, when a statute is susceptible of two or more interpretations, normally that interpretation should be accepted as reflecting the will of the Legislature which is

presumed to operate most equitably, justly and reasonably as judged by the ordinary and normal conceptions of what is right and what is wrong and of what is just and what is unjust.

[16] It is now appropriate to construe r. 41 read with r. 43 in the light of the rules of interpretation just referred to. They are as follows:

Rule 41

Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of an appeal, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the appeal, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence.

Rule 43

When any person who is under no disability or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the cause or matter, shall be served with such order mentioned in rule 41, such person may apply to the Court to discharge or vary such order at any time within twelve days from the service thereof.

[17] The starting point for the resolution of the appeal before us is the case of *Pratt v. London Passenger Transport Board; Green v. Vandekar* [1937] 1 All ER 473 itself which was the basis of the judgment by the Court of Appeal. In that case O. 16 r. 48 of the English Rules of the Supreme Court was construed as it was done because in the words of Slesser LJ the rule does not say whether the court may appoint a person in *invitum* without having obtained from that person his consent to represent the estate. In the absence of such a qualification in the rule, thereby resulting in an ambiguity, the court was perfectly entitled to proceed the way it did as explained in the passages from *Bindra's Interpretation of Statutes* 7th edn, reproduced earlier. But the language employed in r. 41 is totally different. In plain and unambiguous terms it stipulates that an order to add a person as a party may be obtained *ex parte*. The expression "*ex parte*" is defined in *Blacks Law Dictionary* 8th edn as:

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> Done or made at the instance and for the benefit of one party only, and without notice to, or agument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usually for temporary or emergency relief.

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An *ex parte* application is therefore one that is made without notice to, or argument by, the person to be affected. Obviously this will exclude the consent of the person concerned. This means that r. 41 clearly has in contemplation the dispensation of the consent of the person to be added as a party. This view is supported by the fact that the person added as a party may apply to the court to

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discharge or vary the order at any time within twelve days from the service thereof on him pursuant to r. 43. This will only arise if the order making him a party was, in the first place, obtained without his consent. Effect must therefore be given to the clear language used in r. 41. As the rule is capable of only one construction it

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must be given the meaning it conveys as explained in the passages from *Bindra's Interpretation of Statutes* 7th edn reproduced earlier. In the final analysis an application under r. 41 does not require the consent of the person who is to be made a party. The answer to the question posed is therefore in the negative. The procedure

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adopted by the defendant is thus correct in law.

[18] My learned brother Zaki Tun Azmi CJ has expressed his own views on this judgment while my learned brother Arifin Zakaria CJ (Malaya) in agreeing with this judgment has added a supplementary

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judgment.

[19] Accordingly, the appeal is allowed. There shall be no order as to costs both in the court below and here. Deposit to be refunded to appellant.

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Zaki Tun Azmi CJ:

[20] I have had the privilege of reading the draft judgment of my learned brother Augustine Paul FCJ. I decided to write one of my own.

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[21] The issue at hand in this appeal is whether in an application under r. 41 of the Rules of the Court of Appeal, consent must be obtained from one Md Zaini bin Haji Mohd Noor (the son to and one of the heirs to the estate of the first plaintiff) to appoint him

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to be a representative to the estate of the deceased first plaintiff.

[22] To understand better my judgment, it is necessary to cite only some of the relevant facts.

[23] This case originated in the High Court in Alor Setar in the year 1981. Two of the original plaintiffs and the original defendant passed away. The second and third plaintiffs were substituted. There is sufficient evidence from the record to show that parties dragged on the hearing of this case. I must say, this is another good example that delay in prosecuting an action can cause a lot of inconvenience to all concerned and cause injustice.

[24] The action arose as a result of a dispute relating to the sale and purchase of a piece of land that was alleged to have taken place seven years earlier in February 1974. As a result of the dispute arising from that sale and purchase of the land, a caveat was lodged in respect of the said land.

[25] Between the date of filing and the hearing of the case, an application to strike out the suit under O. 18 r. 19 was filed. In 1986 the defendant filed a judgment in default against the counterclaim. In 1988, two years later, the defendant filed an application for show cause for want of prosecution. In 1989, an application was filed to amend the defence. The trial was not concluded until 1996. Judgment was given in favour of the plaintiffs.

[26] The defendant appealed to the Court of Appeal which was not heard until 1999. The appeal was allowed with costs on 12 July 1999, as below:

...

Adalah Diperintahkan bahawa:

(a) Rayuan dibenarkan dan perintah Hakim Mahkamah Tinggi yang membenarkan tuntutan Plaintif dengan kos bertarikh 12.2.96 diketepikan;

(b) Perintah Hakim Mahkamah Tinggi yang menolak tuntutan-balas dengan kos diketepikan dan tuntutan-balas tersebut adalah dibenarkan;

(c) Deposit RM500.00 dikembalikan kepada Perayu; dan

(d) Kos rayuan ini dan kos di Mahkamah Tinggi akan dibayar oleh Responden-Responden kepada Perayu.

[Note the wordings of paragraph (d) on liability for costs]

[27] The plaintiffs' motion for leave to appeal was dismissed by the Federal Court in 2000 and therefore it is for the Court of Appeal to decide on costs, which notice was only filed by the defendant in 2007.

[28] Before the question of costs was decided, the first plaintiff (now respondent in the appeal to the Court of Appeal) died. The defendant (now appellant) sought to appoint Md. Zaini bin Haji Mohd Noor, one of the sons of the first plaintiff/respondent.

[29] The issue mentioned in para. 2 above was highlighted by the Court of Appeal only when dismissing the defendant's motion to replace the first plaintiff. The Court of Appeal in arriving at the conclusion that consent is required before a person can be appointed as a legal representative, followed the case of *Pratt v. Passenger Transport Board*; *Green v. Vandekar*[1]. That English case is based on the English provision of O. 16 r. 46 of the Rules of the Supreme Court which reads as follows:

> If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has **no legal personal representative**, the court or judge may proceed in the absence of any person representing the estate of the deceased person, **or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice** (then the notice is specified) and **the order** so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding. (Emphasis added)

[30] The Malaysian provision on the other hand under r. 41 of the Rules of the Court of Appeal 1994 provides as follows:

> **Where by reason** of marriage, **death** or bankruptcy, or any other event occurring after the commencement of an appeal, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the appeal, **it becomes** necessary **or desirable that any person not already a party should be made a party**, or that any person already a party should be made a party in another capacity, **an order** that the proceedings shall be carried on between the continuing parties, and such new party or parties, **may be obtained *ex parte* on application to the Court**, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence. (Emphasis added)

[31] Be it the English provision or the Malaysian provision, the appointment of the person to represent the estate of the deceased person is discretionary. How is discretion to be exercised on the facts of this case? If we are to follow *Pratt v. Passenger Transport Board*; *Green v. Vandekar*[2], the consent of the person to be appointed as a party is necessary. When the consent of the appointee is not obtained, a number of problems can arise. What if the person appointed as a party decides to:

a. just ignore the appointment, or

b. not to take any action to respond to it, whether by not applying to set aside the appointment, or

c. not to respond to any consequential orders which the court may make against the estate?

This can happen as it did in a number of English cases[3]. He may ignore the order because he is not interested to share in the assets of the estate or because the estate is insolvent[4]. If that happens, the estate will be prejudiced.

[32] Aside from that, this case before us relates to taxation of costs. Costs has been awarded against the estate in favour of the appellant. The letters of administration for the estate, as said above, has not been taken out. In *Meredyth and Two Others v. Hughes and Others*[5] Lord Chief Baron said:

> Before the costs were taxed one of the plaintiffs died: the master proceeded with the taxation, and made his certificate, notwithstanding the surviving plaintiffs objected to the taxation on the ground that suit was abated. On an application to quash the certificate, the Court held that the proceedings were regular.

[33] In my opinion, in any case where costs are awarded against several parties without specially mentioning how the liability is to be distributed, the liability is joint and several.

[34] In *Aspden v. Seddon*[6], the then Master of the Rolls followed the decision in *Meredyth and Two Others v. Hughes and Others* and held in that case that:

> ... the defendants were equally entitled to have the costs taxed against the surviving plaintiffs in the absence of a legal representative of the deceased plaintiff.

[35] Following this argument, the appellant before us can proceed with taxation of costs against the other two respondents. This is another reason why the court can exercise its discretion not to appoint a personal representative.

[36] It is argued by the appellant that because the application can be made *ex parte*, any person can be appointed as representative as the order can be set aside under r. 43. In my opinion, it should not be read that way.

[37] The fact it can be made *ex parte* is insufficient to enable the applicant to just nominate any person. The term *ex parte* means that the application can be made and in the absence of the party against whom the order is made. Some of the situations where *ex parte* orders are made are:

a. the application is urgent, or

b. when it is proven that to inform the other party would defeat the purpose of the order eg, injunction, or his presence is not necessary.

[38] Even if there is a representative already appointed, the party concerned may still apply *ex parte* ie, without the representative being present in court. In this instance, again it is the estate which will be prejudiced, not the representative, if the representative chooses not to respond to any order obtained *ex parte*.

[39] In my opinion therefore, the intended representative must give his consent. Once he has consented to represent the estate, the application can still be made *ex parte*.

[40] It is also in my opinion that a discretion properly exercised should not be disturbed even though another judge of another court in the same position would have exercised the discretion in a different way. A judge must have reasons to decide on an order based on the facts of each case.

[41] For reasons stated above, the answer to the question based on the facts of this case is in the positive. The appeal is dismissed with costs.

Endnotes:

1. [1937] 1 All ER 473
2. *supra*
3. See *Re Curtis and Betts* [1887] WN 126; 23 Digest 213, 2516, *Watts v. Official Solicitor* [1936] 1 All ER 249
4. See *Curtis v. Caledonian Fire and Life Insurance Company* [1881] [Vol XIX] Ch 534 and *In re Richerson Scales v. Heyhoe (No. 2)* [1893] 3 Ch 146
5. [1839] 3 Y & J 188
6. [1877] WN 207